Supreme Court, U. S.
FILED
DEC 6 1980
MICHAEL RODAK, JR., CLERK

80-913

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

RICHARD L. INGLE
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

ALPHONSO H. VOORHEES
GREENFIELD, DAVIDSON,
MANDELSTAMM & VOORHEES
721 Olive Street
St. Louis, Missouri 63101
(314) 241-5735
(Counsel of Record)

THOMAS H. POLLIHAN
Counsel for Petitioner

December 4, 1980

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

(1) Must *Norfolk and Western Railway Company* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed. 2d 689 (1980); reh. den. ____ U.S. ____, 100 S.Ct. 1667, 64 L.Ed. 2d 250 (1980) be applied retroactively to a Federal Employer's Liability Act (FELA), 45 U.S.C. Section 51 et seq., case on direct review at the time of the *Liepelt, supra,* decision and involving the issue of the trial court's refusal on request to instruct the jury on the impact of taxation on their verdict, even though the jury had specifically requested guidance from the Court on this issue during its deliberation?

(2) Did this Court intend that its holding in *Norfolk and Western Railway Company* v. *Liepelt, supra,* be applied by the courts in a non uniform manner with each reviewing court exercising its individual discretion in first determining whether the particular verdict appealled is excessive, and only applying *Liepelt, supra,* if it first finds excessiveness?[1]

---

[1] The caption of the case contains the names of all parties to the proceeding.

TABLE OF CONTENTS

	Page
Questions Presented	i
Preface	1
Opinions Below	2
Jurisdiction	2
Statement of the Case	2
Argument	4
Conclusion	8
Appendix A — Supplemental Opinion on Motion for Rehearing of Missouri Court of Appeals, Eastern District - Richard L. Ingle, Respondent v. Illinois Central Gulf Railroad Company, Appellant	A-1
Appendix B — Opinion of Missouri Court of Appeals, Eastern District - Richard L. Ingle, Respondent v. Illinois Central Gulf Railroad Company, Appellant	A-7
Appendix C — Order Denying Transfer by the Missouri Supreme Court - Richard L. Ingle, Respondent v. Illinois Central Gulf Railroad Company, Appellant	A-17

TABLE OF AUTHORITIES

Cases

Bair v. St. Louis - San Francisco Railway, Co. Mo.Ct. Apps. - Eastern District No. 42756 (still pending)	6

PREVIOUS PAGE WAS BLANK

Campbell v. St. Louis - San Francisco Railway, Co. Mo.Ct. Apps. - Eastern District No. 42949 (still pending) 6

Cazad v. Chesapeake & Ohio Railway Co., 622 F.2d 72 (4th Cir. 1980) 4,5

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) 4

Crabtree v. St. Louis - San Francisco Railway Co., ____ Ill. App. ____, 411 NE 2d 19 (1980) 5

Dunn v. St. Louis - San Francisco Railway, Co., Mo. S.Ct. No. 62428 (still pending) 6

Flanigan v. Burlington Northern Inc., ____ F 2d ____, (8th Cir 1980), No. 79-1703, filed Sept. 4, 1980, to be published in West's Dec. 15, 1980 issue of F 2d Advance Sheets 5,7

Ingle v. Illinois Central Gulf Railroad Co., ____ S.W.2d ____, (Mo.App. 1980) No. 40,300, filed Jan. 22, 1980. (Appendix B) 2,A-7

Ingle v. Illinois Central Gulf Railroad Co., 603 S.W. 2d 32 (Mo.App. 1980). (Appendix A) 2,3,5,6,7,A-1

Lang v. Texas & Pacific Railway Co., 624 F 2d 1275 (5th Cir. 1980) 5

Norfolk & Western Railway Co. v. Liepelt, 444 US 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980); reh. den. ____ U.S. ____, 100 S. Ct. 1667, 64 L. Ed. 2d 250 (1980) i,3,4,5,6,7,8

Oltersdorf v. Chesapeake & Ohio Railroad Co., 83 Ill.App. 3d 395, 404 NE 2d 320 (Ill. App. 1980) ... 5

Seaboard Coast Line Railroad Co. v. Yow, 384 So 2d 13 (Ala 1980) 5

Statutes

Federal Employer's Liability Act

45 U.S.C. Section 51 et seq. i,2,3,4

Judiciary and Judicial Procedure

28 U.S.C. Section 1257 (3) 2

28 U.S.C. Section 2101 (c) 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

RICHARD L. INGLE
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

The petitioner, Illinois Central Gulf Railroad Company ("ICG"),[2] respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Eastern District entered in this proceeding on July 1, 1980.

---

[2] Parent Corporation: I. C. Industries; Other subsidiaries of I. C. Industries: Centigon, Inc., Endro, Inc., Haleyville Tubes, Inc., I. C. Equipment Leasing Co., I. C. Leasing, Inc., I. C. Products Co., I. C. Sub, Inc., Iconic, Inc., Illinois Center Corporation, Illinois Central Industries, Inc., La Salle Properties, Inc., Lincoln Financial, Inc., Mid-America Improvement Corporation, Pepsi-Cola Bottling Co. of Kenosha and Racine, Inc., Pet, Inc., H. F. Philipsborn and Company, Philipsborn Equitie, Inc., and South Properties, Inc.,; Subsidiaries of Illinois Central Gulf Railroad Company: Blue Island Railroad Company, Chicago Intermodal Company, G M & D Land Company, Gulf Transport Company, Kensington and Eastern Railroad Company, New Orleans Great Northern Railway Company, South Chicago Railroad Company, Waterloo Railroad Company, and Mississippi Valley Corporation.

OPINIONS BELOW

The original opinion of the Missouri Court of Appeals, Eastern District, in *Richard L. Ingle* v. *Illinois Central Gulf Railroad Company* was filed January 22, 1980, No. 40,300. This opinion is not reported, but is contained in Appendix B. The supplemental opinion of that same Court in the same case On Motion for Rehearing is reported at 603 S.W. 2d 32 (Mo. App. 1980) and is contained in Appendix A. The order of the Missouri Supreme Court denying the application to transfer was entered September 9, 1980 and is contained in Appendix C.

JURISDICTION

Illinois Central Gulf Railroad Company appealed this case to the Missouri Court of Appeals, Eastern District. The appeal was affirmed by an opinion filed January 22, 1980. Appellant's Motion for Rehearing was granted and on July 1, 1980 the Missouri Court of Appeals, Eastern District, rendered its decision on the Motion for Rehearing. Appellant's timely application to transfer the case to the Supreme Court of Missouri was denied September 9, 1980. This Petition is being filed within ninety (90) days of the denial of the Application to Transfer to the Supreme Court of Missouri which is the highest Court in the State of Missouri, pursuant to the provisions of 28 U.S.C. section 2101(c). The jurisdiction of this Court to review the judgment and decision in this case by Writ of Certiorari is conferred by 28 U.S.C. Section 1257(3), since the case involves rights claimed under the Federal Employer's Liability Act (FELA), 45 U.S.C. Section 51 et seq.

STATEMENT OF THE CASE

This action was instituted by Richard L. Ingle against Illinois Central Gulf Railroad Company in the Missouri State Courts pursuant to the provisions of the Federal Employer's Liability

Act (45 U.S.C. 51 et seq.) to recover damages for injuries which he received in Montgomery, Alabama on November 20, 1973 while he was employed by defendant railroad.

During the course of the trial in December of 1977, specifically following the evidence and during the deliberation of the jury, the jury sent a note to the trial judge which stated: "What taxes come out of any settlement?" The trial judge refused defendant's request that the jury be instructed that any verdict that they give is not subject to any Federal or State income taxes. Without this requested instruction on taxes, the jury returned its verdict in favor of plaintiff in the amount of $550,000.00.

Defendant complained of the refusal of the Court to instruct the jury on the impact of taxation on its verdict in its motion for new trial and has continued to cite this refusal as error and preserve this point throughout the appellate process, requesting relief in the form of a new trial on the issue of damages.

The original opinion dated January 22, 1980 affirmed. A timely Motion for Rehearing or Transfer was filed and the case was still pending on appeal at the time of the decision of this Court in *Norfolk and Western Railway Company* v. *Liepelt, supra,* on Feburary 19, 1980. *Liepelt* held that it was in error to refuse such an instruction in an F.E.L.A. case. The issue of the retroactivity or prospectivity of *Liepelt* was then briefed and argued before the Missouri Court of Appeals. The supplemental Opinion On Motion For Rehearing again affirmed and refused to apply *Liepelt* retroactively.

ARGUMENT

This Court is being asked to grant a Writ of Certiorari in order to resolve a conflict between the decision of the Missouri Court of Appeals in our present case, *Ingle* v. *Illinois Central Gulf Railroad Company,* 603 S.W. 2d 32 (Mo. App. 1980), (Appendix A), and the recent decision of this Court in the case of *Norfolk and Western Railway Company* v. *Liepelt,* 444 U.S. 490, 100 S. Ct. 755, 62 L.Ed. 2d 689 (1980) reh. den. 100 S. Ct. 1667. The *Ingle* decision is also in conflict with decisions from the United States Courts of Appeals for the Fourth, Fifth, and Eighth Circuits and with Courts of Last Resort in the States of Alabama and Illinois.

The *Liepelt* case held that the jury in the trial of an FELA case should be instructed on request that their verdict would not be subject to income taxes. This issue is squarely and emphatically presented in the *Ingle* case. In *Ingle,* the jury actually took the trouble to write a note to the trial judge asking that they be advised as to this very question of taxation. Defendant requested that the jury be instructed that any verdict that they give is not subject to any Federal or State income taxes. The judge refused this request and refused to answer the question of the jury. The judge sent a note back to the jury which stated "You have been fully instructed."

The Missouri Court of Appeals stated in its decision on the *Ingle* case: "However, the (U.S. Supreme) Court did not enunciate whether its ruling (in *Liepelt*) was to be applied retroactively to pending appellate cases." 602 S.W. 2d 32, l.c. 34. Then, following a discussion regarding *Chevron Oil Company* v. *Huson,* 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) the *Ingle* decision continues: "Applying the above standards to the facts of the instant case, we have determined that *Liepelt* should be applied prospectively." 602 S.W. 2d 32, l.c. 34.

In the case of *Cazad* v. *Chesapeake and Ohio Railway Company,* 622 F 2d 72 (4th Cir. 1980) the United States Court of Ap-

peals for the Fourth Circuit retroactively applied the law of the *Liepelt* case which was decided while *Cazad* was still on direct review.

The case of *Lang* v. *Texas and Pacific Railway Company,* 624 F 2d 1275 (5th Cir. 1980) likewise gave retroactive application to *Liepelt.* The Fifth Circuit Court of Appeals ordered a new trial on the issue of damages because of the refusal to instruct the jury on the question of taxation.

Additionally, the Court of Appeals for the Eighth Circuit considered this question in *Flanigan* v. *Burlington Northern, Inc.,* ____ F 2d ____ (8th Cir. 1980), (No. 79-1703, decided September 4, 1980 to be reported in Federal Reporter Advance Sheet of December 15, 1980.) The *Flanigan* decision contains a lengthy discussion of the retroactivity question concluding that *Liepelt* should be applied retroactively.

Further, the Supreme Court of Alabama in the case of *Seaboard Coast Line Railroad Company* v. *Yow,* 384 So. 2d 13 (Ala. 1980) has applied the *Liepelt* decision retroactively. And the Appellate Courts of Illinois in *Oltersdorf* v. *Chesapeake and Ohio Railroad Company,* 83 Ill. App. 3d 395, 404 N.E. 2d 320 (1980) and in *Crabtree* v. *St. Louis - San Francisco Railway Company,* ____ Ill. App. ____, 411 N.E. 2d 19 (1980) have likewise given retroactive application to *Liepelt* with both of these cases being reversed because of the refusal of requested instructions on taxation.

Although there have been five jurisdictions deciding in favor of the retroactive application of *Liepelt* and contra to *Ingle,* there is continuing danger that other Courts considering the question might be attracted by the rationale of the *Ingle* case if the *Ingle* decision is permitted to stand. In considering the *Ingle* opinion, the Eighth Circuit in its *Flanigan* decision conceded that the *Ingle* rationale was appealing. Aside from the danger of *Ingle* being followed by Courts of other jurisdictions, there are presently at least three additional cases pending in the Appellate

Courts of Missouri which directly involve the issue of the retroactivity of the *Liepelt* decision. These are: *Dunn* v. *St. Louis - San Francisco Railway Company,* Missouri Supreme Court No. 62428; *Bair* v. *St. Louis — San Francisco Railway Company,* Missouri Court of Appeals Eastern District No. 42756; and *Campbell* v. *St. Louis - San Francisco Railway Company,* Missouri Court of Appeals, Eastern District No. 42949.

If the *Ingle* opinion is permitted to stand, it will certainly be followed in the above cases presently pending in Missouri. Each of these cases was tried prior to the *Liepelt* decision and was on direct review at the time of that decision.

An additional factor in the *Ingle* decision beyond the refusal to give retroactive application to *Liepelt* is the implicit invitation for Courts to use their discretion on whether there has been any prejudice by reason of refusal of the instruction. Such unbridled discretion will lead to a non uniform application of the holding of *Liepelt.*

The Missouri Court of Appeals in its *Ingle* decision stated:

> "Since the primary purpose underlying *Liepelt* was the Court's desire to prevent the rendering of an excessive verdict founded upon improper considerations, retroactive application of *Liepelt* could in no manner be held to "further" the operation of the rule unless it is apparent in a particular case on direct review that the damages awarded are obviously excessive." 603 S.W. 2d 32, l.c. 34.

Thus the Missouri Court has delegated to itself the discretionary power to determine that a verdict is not "obviously excessive" in which case it will refuse to follow *Liepelt.*

Even though the jury may have returned a verdict in an amount substantially higher than they would have rendered had they been sophisticated in the laws of taxation, the Missouri Courts now say that if this higher verdict is not "obviously excessive" they need not apply *Liepelt.*

The *Ingle* Court continues down the path of this escape which they have given themselves from the *Liepelt* decision and states: "In the case at bar since the damages awarded are not excessive, it is difficult to imagine how the appellant has been prejudiced." 603 S.W. 2d 32, l.c. 35.

Even though the jury returned a verdict higher than it would have if properly instructed, if the Missouri Court does not feel this verdict to be "excessive" it will then hold that defendant has not been prejudiced. Although the *Flanigan* decision by the Eighth Circuit rejected the *Ingle* Court's non retroactive application of *Liepelt,* the *Flanigan* Court did follow the lead of the Missouri Court with regard to retaining the province of determining for itself whether the failure to give the taxation instruction has resulted in prejudice. The *Flanigan* opinion states: "In the present case without evidence of an excessive verdict and considering all of the other relevant factors, we find the failure to give the instruction was not prejudicial to the rights of the parties." (Last paragraph of opinion; Local citation not yet available.)

To this extent, even in the short time since *Ingle* was decided, it's rationale has been found attractive. Given more time and given the support of the Eighth Circuit in the *Flanigan* case, this theory of no prejudice unless the verdict is "excessive" can be expected to spread.

Only intervention by this Court can correct the prejudice to the Petitioner and prevent the likely perpetuation in other jurisdictions of the *Ingle* non retroactive rationale and prevent its virtually certain application to the cases now pending in Missouri. Only guidance by this Court will maintain a uniform application of the *Liepelt* decision and prevent various reviewing Courts from applying their own discretionary views to the size of any particular verdict before determining that *Liepelt* should be followed.

CONCLUSION

It is respectfully submitted that because of the clear cut conflict on the question of the retroactive application of the *Liepelt* decision and because of the developing probability of non uniform application of the *Liepelt* decision, both of which questions are of great importance to the nation's railroad industry, the within Petition for Writ of Certiorari should be granted so that the decision of the Missouri Court of Appeals, Eastern District, can be reviewed and proper guidance provided by this Court on these questions.

Respectfully submitted,

ALPHONSO H. VOORHEES
GREENFIELD, DAVIDSON,
MANDELSTAMM & VOORHEES
721 Olive Street
St. Louis, Missouri 63101
(314) 241-5735
(Counsel of Record)

THOMAS H. POLLIHAN
Counsel for Petitioner

APPENDIX

APPENDIX A

In The Missouri Court of Appeals
Eastern District

EN BANC

No. 40300

Richard L. Ingle,
Respondent,

vs.

Illinois Central Gulf Railroad Company,
Appellant.

Appeal from the Circuit Court of the City of St. Louis
Hon. Daniel T. Tillman, Judge
Opinion Filed:
July 1, 1980

On Motion For Rehearing

PER CURIAM:

This cause was argued and submitted to Division Two of this court at its October, 1979, session in St. Louis. On January 22, 1980, the principal opinion was adopted without dissent. On February 6, 1980, the appellant filed its motion for rehearing or transfer to the Supreme Court of Missouri. While appellant's motion was under consideration, the Supreme Court of the United States, on February 19, 1980, handed down its opinion in Norfolk & W. Ry. v. Liepelt, U.S. 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980). *Liepelt* was an F.E.L.A. death claim and held, among other matters, that it was necessary that the jury be instructed that no damage award shall be subject to federal in-

come tax. On May 6, 1980, appellant's motion for rehearing was heard En banc on the *Liepelt* issue regarding income tax instruction and whether its application would be prospective or retrospective.

To apply the Supreme Court's ruling in *Liepelt* to the instant case, several principles must be reviewed. We recognize, as indeed we must, that the substantive rights of the parties are governed by federal law and the decision of the U.S. Supreme Court must control, Horn v. Atchison, T. & S.F. Ry., 519 S.W. 2d 894, 896 (Tex. Civ. App. 1975). It has long been settled that questions concerning the measure of damages in an F.E.L.A. action are federal in character. This is true even if the action is brought in state court. Norfolk & W. Ry. v. Liepelt, *supra.*

However the Court did not enunciate whether its ruling was to be applied retroactively to pending appellate cases. We must therefore apply existing standards and guidelines. In Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) the Court stated:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." * * * Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." * * *

Applying the above standards to the facts of the instant case, we have determined that *Liepelt* should be applied prospectively.[1] First, the rule promulgated by the Supreme Court is one of first impression. The federal circuits were split on whether the jury should be instructed on income taxes. See Domeracki v. Humble Oil & Refining Co., 443 F. 2d 1245, 1252 (3rd Cir. 1971). The Missouri appellate courts forbade such an instruction. Senter v. Ferguson, 486 S.W. 2d 644 (Mo. App. 1972). *Liepelt* will, for the first time, unify the federal and state F.E.L.A. instructions on this point. The trial judge in the instant case was executing his duties according to the law, Lemon v. Kurtzman, 411 U.S. 192, 202 (1973), and at that time, it was mandatory that he not give such an instruction. Therefore, he was not in error in failing to anticipate future changes in instructions on this subject mandated by the highest court of the land. Smile v. Lawson, 506 S.W. 2d 400, 402 (Mo. 1974).

Secondly, for us to apply the *Liepelt* rule retroactively to the instant case would be anomalous. A careful analysis of the "Second" factor in *Chevron,* requires us to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

Since the primary purpose underlying *Liepelt* was the Court's desire to prevent the rendering of an excessive verdict founded upon improper considerations, retroactive application of *Liepelt* could in no manner be held to "further" the operation of the rule unless it is apparent in a particular case on direct appeal that the damages awarded are obviously excesive. Accordingly, in the instant case where the damages awarded are clearly

---

[1] See generally prospective or retrospective operation of overruling decision, Annot., 10 ALR 3d 1371 (1966).

reasonable, justified and supported by the evidence,[2] indiscriminate retroactive application would not "further" the purpose of the rule and conversely its prospective application would not "retard" its operation.

Such non-retroactive application is supported by the three cases cited and relied upon by the United States Supreme Court in *Liepelt: Dempsey* v. *Thompson,* 251 S.W. 2d 42 (Mo. 1952); *Domeracki* v. *Humble Oil & Refining Co.,* 443 F. 2d 1245 (3rd Cir. 1971) and *Burlington Northern, Inc.* v. *Boxberger,* 529 F. 2d 284 (9th Cir. 1975). In all three cases the new rule with respect to the income tax instruction was given prospective application only, and its prospectivity was in no manner construed to retard its purpose or operation. Since those cases were cited and relied upon in *Liepelt,* and since prospective application of the new rule in those cases did not retard its operation, "prior history" clearly supports non-retroactive application in the instant case.

In cases in which uncertainty exists as to whether retroactive application would further or retard the operation of a new rule, other courts have employed a similar balancing test in applying the "Second" factor in *Chevron.* They have weighed such factors as reliance upon existing applicable law, the need for stability, resulting hardship and injustice, against the benefits to be gained by applying a new rule retroactively.[3]

---

[2] See p. 5 of this opinion.

[3] See Ramey v. Harber, 589 F. 753 (4th Cir. 1978), cert denied 99 S. Ct. 2823; Kacher v. Pittsburgh National Bank, 545 F. 2d 842 (3rd Cir. 1976); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1973); Lemon v. Kurtzman, 411 U.S. 192-93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973); Linkletter v. Walker, 381 U.S. 618, 629, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965); and Keltner v. Keltner, 589 S.W. 2d 235 (Mo. En Banc, 1979), regarding preference for prospective application.

In the case at bar since the damages awarded are not excessive, it is difficult to imagine how the appellant has been prejudiced. Because the award is reasonable and amply supported by the evidence, retroactive application of *Liepelt* would serve no useful purpose. Retroactivity would not further the purpose of the new rule. Likewise, prospectivity would not retard its operation. There is therefore simply no compelling reason to give retroactive effect to *Liepelt* here. The trial court and respondent scrupulously complied with existing applicable law, as they were compelled to do, and they should not be penalized under such circumstances. Since retroactive application would occasion a reversal in this instance, in which no actual prejudice has been suffered, consideration of this "Second" factor in the above light compels a ruling of prospectivity.

Finally, the third factor to be considered is whether or not retroactively applying *Liepelt* would produce substantial inequitable results to the plaintiff. In that case the amount of the pecuniary loss was $302,000, according to plaintiff's economist, and the jury awarded damages of $775,000. The defendant objected and by its expert testimony the net pecuniary loss was $138,327. The Supreme Court believed that based upon those facts, the jury must have considered the tax issue and included it in their decision and therefore the defendant was prejudiced. However in this case we do not have any proof or suggestion that the appellant was prejudiced by the failure of the trial court to submit the requested but not offered cautionary instruction. Further, the appellant did not raise the issue of excessiveness. To briefly review the pertinent facts, the plaintiff was 45 years old, earning $12,000 per year at the time of the accident. He suffered permanent, serious, deteriorating and disabling injuries, incuding, among other surgery, an insertion of a nerve stimulator affixed to one of his limbs. The jury had the benefit of testimony from four physicians including a neurosurgeon, a neurologist and orthopedic surgeon. The appellant saw fit not to have the plaintiff examined nor to offer any medical evidence

from which the jury could evaluate the extent and degree of plaintiff's injury. It is argued that by the mere fact that the jury made inquiry about taxes, we must assume that the jury acted improperly and inflated the recovery. We do not agree. There is no evidence in the record that the jury was in fact motivated by such fact and, it must be presumed that the jurors followed their oaths and rendered their verdict according to the evidence and the court's instructions. Cristie v. Gas Service Co., 347 S.W. 2d 135, 144 [12] (Mo. 1961); Beste v. Tadlock, 565 S.W. 2d 789, 791-92, [4-6] (Mo. App. 1978). Appellant's motion for rehearing and motion to transfer to the Supreme Court are denied.

All judges concur.

APPENDIX B

In The Missouri Court of Appeals
Eastern District

Division Two

No. 40,300

Richard L. Ingle,
Respondent,

vs.

Illinois Central Gulf Railroad Company,
Appellant

Appeal from the Circuit Court of the
City of St. Louis

Hon. Daniel T. Tillman, Judge

Opinion Filed
(January 22, 1980)

Respondent brought suit under the Federal Employers' Liability Act for lost wages and debilitating injuries suffered on the job against his employer, the Illinois Central Gulf, (appellant). The jury returned a verdict in respondent's favor of $550,000. The railroad appeals.

Respondent went to work for the Gulf, Mobile and Ohio (which later became part of the Illinois Central Gulf System) in the railroad yards at Montgomery, Alabama, in 1950. He started as a helper and rose to the level of carman, a member of a skilled craft which repairs the couples, trucks, wheels, doors and safety appliances on railway boxcars, hoppers and gondolas.

In 1959, the railroad's diesel repair shop at Montgomery moved to Tuscaloosa. Prior to 1959, specially trained

machinists and electricians inspected the locomotives daily at Montgomery and did all necessary repair work there. When the diesel repair shop moved to Tuscaloosa, so did the machinists and electricians.

Because federal regulations required that locomotives be inspected daily, it was necessary for the appellant to inspect the locomotives being used in the Montgomery yards. However, because there were no machinists and electricians at Montgomery, the railroad pressed carmen into service to perform the inspections.

Respondent was one such carman. On Friday, November 16, 1973, a traction motor blower broke on Engine 1269. Respondent's foreman instructed him to fix it when a new blower arrived. It came from Tuscaloosa on Tuesday, November 20.

The traction motor blower lies in the high voltage cabinet of the engine about two and one-half to three feet below the engine. The high voltage cabinet is a clutter of wires, pipes, fuel pumps, valves, and has a shaft going through it which powers the traction motor blower. There is barely enough room for a man to squeeze into the cabinet. The floor of the cabinet is sometimes slippery due to the presence of an oily film.

Testimony from former machinists stated that the correct method of removing a blower requires the use of two chain block hoists and three men, a machinist, a helper and a laborer. However, respondent had never seen this method used and had no knowledge of it. The railroad had never given respondent any training on how to remove a blower; it had neither provided him with tools nor given him adequate help to do the job.

Prior to his injury, respondent had removed five or six blowers alone by lifting them up and out of the cabinet without the aid of a hoist or additional manpower. On November 20, 1973, as respondent was in a twisted and contorted position inside the cabinet, lifting the blower up and out, the blower, being

top-heavy and weighing about 100 pounds, flipped over wrenching his arms. His right arm felt like it had been ripped from its socket; the pain shot between his shoulders, down his back and into his right arm. However, because the compartment was so cramped, he did not drop the blower lest he drop it on himself.

Respondent finished work that day and continued to report to work hoping his condition would improve and his pain would subside. However, his condition deteriorated and his pain got worse and worse.In February of 1974, respondent was hospitalized for a myelogram. The myelogram revealed damage to both the cervical and lumbar areas of his spine. Later in February of that year this 45 year old respondent was rehospitalized and underwent cervical disc surgery. In June he underwent lumbar disc surgery. Since his operations, respondent's right arm has so atrophied that he possesses only about 2/5 to 3/5 of the strength of his left arm. He can do no work requiring the use of his right arm. Certain activities cause his legs to bother him. He can drive a car providing it is equipped with power brakes and power steering. His pain is constant. He sleeps little. He takes Percodan, a narcotic, and wears a transcutaneous nerve stimulator. His medication and stimulator give him some relief. His condition is permanent and deteriorating.

The appellant's first assignment of error is that the trial court abused its discretion in overruling the railroad's motion to dismiss on the ground of forum non conveniens and the trial in St. Louis resulted in substantial prejudice to appellant.

In determining this point we must review certain standards applicable to the trial court's action. "Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be

said that the trial court abused its discretion. Anderson v. Robertson, Mo. App., 402 S.W. 2d 589 [3-4]." Shirrell v. Missouri Edison Co., 535 S.W. 2d 446, 448 (Mo. banc 1976), quoting James v. Turilli, 473 S.W. 2d 757, 763 (Mo. App. 1971).

Further, our courts have said that the doctrine of forum non conveniens is to applied only with caution; and unless the balance of equities is strongly in favor of not forcing these defendants to trial in Missouri, plaintiff's choice of Missouri as the forum for this litigation should not be disturbed. State ex rel. Farmland Indus., Inc. v. Elliott, 560 S.W. 2d 60, 63 (Mo. App. 1977) citing Loftus v. Lee, 308 S.W. 2d 654 (Mo. 1958); Gulf Oil Corporation v. Gilbert, 330 U.S. 501 (1947); J. F. Pritchard & Co. v. Dow Chemical of Canada, Ltd., 462 F. 2d 998, 1000 (8th Cir. 1972).

The facts gleaned from the three volumes of transcript disclosed that appellant is a Delaware Corporation with its principal office in Chicago. It is actively engaged in the railroad business in the City of St. Louis and the State of Missouri. It maintains offices and employees throughout the Metropolitan St. Louis area. Additionally, the appellant's trial attorney has a St. Louis office. Moreover, the trial of the case did not present the difficulties predicted by his client in its motion. It appears that respondent and appellant produced those witnesses deemed important without difficulty. The respondent produced at trial the two examining doctors and all of the medical records from the Montgomery, Alabama hospital. Further, the appellant's trial attorney and claims manager were present when the two treating physicians were deposed in Montgomery, Alabama. We also note that the appellant did not obtain a medical examination of respondent by a doctor of its own choosing and presented no medical evidence.

Considering the factors as enumerated by our Supreme Court in State ex rel. Chicago R.I. & P.R. v. Riederer, 454 S.W. 2d 36, 39 (Mo. banc 1970)[1] and the facts enumerated above this

court cannot find an imbalance of equities or that the trial court's action was arbitrary or unreasonable and therefore we find that the trial court did not abuse its discretion in denying appellant's motion to dismiss for forum non conveniens. Appellant's first assignment of error is denied.

Appellant's second contention is that the trial court erred in excluding a witness for the appellant, Mr. Wilkinson, from the courtroom. The appellant contends that the exclusion was prejudicial toward the appellant and its employees. Mr. Wilkinson had previously testified for the appellant. Respondent called Mr. Stabler, an employee of the appellant, to the stand to rebut Mr. Wilkinson. Before Mr. Stabler testified, respondent's counsel requested that Mr. Wilkinson be excluded from the courtroom as Wilkinson was Stabler's foreman and would have a tendency to inhibit Stabler's testimony. The court granted counsel's request.

Appellant argues that it was prejudiced in two ways. First, the loud general announcement from the bench in the presence of the jury to exclude Wilkinson aroused suspicion of Wilkinson in the minds of the jury. Second, Wilkinson, who was the most knowledgeable technical representative of the appellant, had assisted defense counsel throughout the trial. By excluding Wilkinson, defense counsel was impaired in conducting his defense. To bolster its argument the appellant argues the purpose of sequestering a witness is to prevent a prospective witness from being taught from a previous witness's testimony.

It is well settled that under Rules 78.07 and 78.09 to preserve an issue for appellate review of any ruling of the trial court, the objecting party must make *definite* objections either at the trial or in the motion for a new trial. Beyer v. Pick, 428 S.W. 2d 1, 3 (Mo. App. 1968). The appellant at the time of the exclusion of Wilkinson objected by stating, "I certainly object," and "I will object to excluding Mr. Wilkinson." In addition the appellant in its post-trial motions stated that, "the court erred in sustain-

ing the request of plaintiff's attorney that the witness James Wilkinson, after he had testified be excluded from the courtroom during the testimony of plaintiff's rebuttal witness, and the court erred in overruling defendant's objection to such exclusion even though the court was assured by defendant's counsel that the witness was not going to be called again to testify. The court further erred by announcing in the presence of the jury the witness Wilkinson's exclusion from the courtroom." These objections are neither definite nor sufficient.

Appellant's contentions of prejudice are raised initially in appellant's brief and are untimely. An appellant is not permitted to broaden or change the basis and scope of an objection on appeal beyond that made in trial court. Plumlee v. Ramsay Dry Goods Co., 451 S.W. 2d 603, 605 [2-4] (Mo. App. 1970); State *ex rel.* State Highway Comm'n. v. DeLisle, 425 S.W. 2d 938, 940-41 [4] (Mo. 1968); Luechtefeld v. Marglous, 151 S.W. 2d 710, 713 [1-2] (Mo. App. 1941); Stahlheber v. American Cyanamid Co., 451 S.W. 2d 48, 61 [7] (Mo. 1970); Langdon v. Koch, 435 S.W. 2d 730, 732 [2] (Mo. App. 1968).

Additionally, the record is devoid of any indicia that the trial judge's announcement was loud or boisterous and the appellant has failed to show wherein and how it was prejudiced. Therefore nothing is preserved for review.

Appellant's third point is that he was prejudiced by the remarks of the trial judge. At the conclusion of all the evidence the court stated:

> Ladies and gentlement of the jury, that concludes all of the testimony in this case. The only thing left now is the preparation of instructions, closing arguments of the attorney, and submitting the case to you. It's too late to submit a case of this magnitude, so I will have to excuse you for tonight and bring you back tomorrow morning.

Counsel objected to the phrase "a case of this magnitude" and asked for a mistrial.

The granting of a new trial rests largely in the discretion of the trial court. Rovak v. Schwartz, 339 S.W. 2d 756 (Mo. 1960). Although the court's comment was untimely, the court corrected its error by explaining to the jury that by "magnitude of the case" he "genuinely" meant that the case had taken four days to try and further that he viewed all cases as important. After that explanation and additional discussion with appellant's counsel at bench he again addressed the jury, "As a result, that was the manner in which that statement was made. All of the jurors understand this? Okay. Let the record indicate that all of the jurors are nodding their heads, all of the jurors understand this? (The jurors nodded in the affirmative.)" Appellant's third point is without merit.

Appellant's fourth point is that the trial court erred by failing to instruct the jury on whether the award would be taxed to the plaintiff. After the jury had retired, a juror approached the judge and asked if he could ask a question. The judge told him not to say anything, but to write his question out. The juror wrote, "What taxes come out of any settlement?" The judge then informed counsel for both parties that he was going to respond in writing, "You have been fully instructed," which the court did.

Our Supreme Court has held that the M.A.I. Instructions submit ultimate issues and they do so aptly. Therefore they do not require further clarification or amplification. Houston v. Northup, 460 S.W. 2d 572 (Mo. banc 1970); Senter v. Ferguson, 486 S.W. 2d 644 (Mo. App. 1972). Since F.E.L.A. cases are covered by M.A.I. 24.01 which does not provide for an instruction on taxation, the giving of such an instruction would be an amplification of an already adequate instruction. It would have been error for the court to have given the requested instruction.

Appellant's fourth point is not reversible error and without merit.

Appellant's final point is that the trial court erred in giving instruction No. 2, which is M.A.I. 24.01, by failing to give an additional paragraph requiring the finding that "defendant knew or by using ordinary care should have known of such condition, and that such condition was reasonably likely to cause substantial harm."

Instruction No. 2 as submitted by respondent and given by the trial court was:

> "Your verdict must be for the plaintiff if you believe:
>
> "First, defendant failed to provide reasonably safe methods of work, and
>
> "Second, defendant was thereby negligent, and
>
> "Third, such negligence directly resulted in whole or in part in injury to plaintiff."

Note No. 3 of the "Notes on Use" in reference to the M.A.I. 24.01 instruction, as applicable at the time of the trial, states:

> These theories of negligence concern conditions of which the defendant had constructive knowledge.
>
> In the event plaintiff submits some act of negligence, constructive knowledge of which is not chargeable to the railroad, there shall be submitted in addition a paragraph providing "defendant knew or by using ordinary care should have known of such condition, and that such condition was reasonably likely to cause substantial harm." This paragraph should be inserted between existing paragraphs, Third and Fourth, and the paragraphs should be renumbered accordingly.

The appellant contends that there was not sufficient evidence to establish the defendant's constructive knowledge and therefore the suggested paragraph of Note No. 3 of the "Notes on Use" should have been given.

Our Supreme Court has held that when plaintiff submits that defendants failed to provide either (a) reasonably safe conditions for work, or (b) reasonably safe appliances, or (c) reasonably safe methods of work, or (d) reasonably adequate help, it is unnecessary to charge "defendant knew or by using ordinary care should have known of such condition. . . ." Wilmoth v. Chicago, R.I. & P.R., 486 S.W. 2d 631, 639 (Mo. 1972).

Plaintiff was a carman and was performing machinist's work, for which he was totally unqualified by training, instruction or experience. Carmen are those employees that build, repair and maintain various freight cars and box cars. The carmen craft and the other shop crafts, including the machinists, are required to complete a four year apprenticeship and receive extensive specialized training and instruction in their mechanical fields. The work of repairing and maintaining diesel engines and locomotives, including the removal of traction motor blowers, is the work of the machinist craft. Carmen are not trained in that work, that is not their job. After the last machinist retired or was furloughed at Montgomery, in approximately 1959, the railroad did not rehire any machinists. The equipment and tools used by the machinists were either scrapped or packed up and shipped to other points on the railroad. Carmen were thereafter required to perform the machinists' work of maintaining and repairing locomotives. The carmen received no instructions from machinists or anyone else in performing that work, and were required to provide their own tools and equipment. The task of removing a traction motor blower was extremely difficult, awkward and strenuous. Several carmen, in addition to plaintiff, who testified at the trial agreed that they were required to perform that task alone, without assistance and without the

aid of any mechanical lifting device or hoist, even though the job was too strenuous and difficult to be performed by one man.

Plaintiff was assigned the diesel locomotive job in 1970 or 1971. He was the only employee assigned to work that position. He was not qualified and had never received any training or instruction of any kind. He requested schooling and training. However, none were provided. He requested instructional books. However, none were provided. He was neither provided equipment nor tools and therefore purchased his own. He was provided nothing to perform that job. Before the date of this occurrence he had previously removed two traction motor blowers. The blowers were inaccessible, down in a hole in the high voltage cabinet. His foreman, Mr. Dewberry, instructed him to get in, unloosen the bolts and get it out. No equipment or assistance were provided. He had extreme difficulty both times. He spoke to Mr. Dewberry and told him, "There must be a better way or easier way to do this. It's got to be." Mr. Dewberry told him to do the best he could. Plaintiff requested training or lessons in removing traction motor blowers. However, none were provided. He requested equipment and help. However, none were provided. Neither plaintiff nor any of the other carmen knew of the method used by the machinists, involving two or three employees and two chain block hoists, which was fully described at the trial.

The above evidence was totally undisputed at the trial. That evidence unequivocally established that the defendant had actual knowledge of the proper safe method which should have been utilized to remove a traction motor blower.

We hold that appellant's claim that the submitted instruction was not supported by the evidence has no merit. Accordingly, judgment is affirmed.

/s/ JAMES A. PUDLOWSKI, JUDGE

APPENDIX C

No. 62353

In the Supreme Court of Missouri
Eastern District #40300
September Session 1980

Richard L. Ingle,
Respondent,

vs.

Illinois Central Gulf Railroad,
Appellant.

TRANSFER

Now at this day, on consideration of appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

State Of Missouri—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1980, and on the 9th day of September 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 9th day of September, 1980.

/s/ THOMAS SIMON, Clerk

/s/ ANNE BERKORST, D. C.

Supreme Court, U.S.
FILED
JAN 12 1981
MICHAEL RODAK, JR., CLERK

No. 80-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

RICHARD L. INGLE,
Respondent.

On Petition For Writ of Certiorari
To The Missouri Court of Appeals, Eastern District

BRIEF FOR RESPONDENT IN OPPOSITION

C. MARSHALL FRIEDMAN
NEWTON G. MCCOY
FRIEDMAN WEITZMAN
& FRIEDMAN, P.C.,
The Advocate Building
1133 Pine Street
St. Louis, Missouri 63101
(314) 621-2200
Attorneys for (Plaintiff-)
Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

(RESTATED)

Whether *Norfolk & Western Railway Company* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), should be applied retroactively, to arbitrarily reverse a non-wrongful death FELA case tried more than two years prior to the decision in *Liepelt,* under the following circumstances: Where the defendant made no attempt whatsoever to introduce any evidence pertaining to plaintiff's injuries, damages or wage loss; where there was no issue in the trial and no actuarial testimony presented by either party pertaining to wage loss calculations; where the defendant-railroad did not even offer an instruction on income taxation prior to submission of the case to the jury; where, in any event, Missouri appellate courts forbade the giving of an income tax instruction; where the record on its facts merely presents the limited inquiry of whether the trial court properly responded to a communication received from a juror during the jury's deliberation; where plaintiff's damages were not really contested by the defendant in the trial; and where the amount of the verdict was clearly not excessive, was fully supported by the evidence, and the defendant-railroad did not even raise the issue of excessiveness of the verdict as a point on appeal.

TABLE OF CONTENTS

Question Presented i

Opinions Below 1

Jurisdiction 1

Statement of the Case 2

Argument 3

Conclusion 25

TABLE OF AUTHORITIES

Cases

Boston & Me.R.R. v. Talber, 360 F.2d 286 (1st Cir. 1966) 9

Bracy v. Great Northern Railway Co., 343 P.2d 848 (Mont. 1959), cert den., 361 U.S. 949, 80 S.Ct. 403 (1960) 10

Briggs v. Chicago Great Western Railway Co., 248 Minn. 418, 80 N.W. 2d 625 (1957) 10

Brown v. St. Louis Public Service Company, 421 S.W.2d 255 (Mo.banc 1967) 11

Cazad v. Chesapeake & Ohio Railway Co., 622 F.2d 72 (4th Cir. 1980) 7

Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) 6,7,8,14,20,21

Crabtree v. St. Louis-San Francisco Railway Co., ____ Ill. App. ____, 411 NE2d 19 (1980) 10

Davis v. Fortino & Jackson Chevrolet Co., 510 P.2d 1376 (Colo.App. 1973) 10

PREVIOUS PAGE WAS BLANK

Dempsey v. Thompson, 251 S.W.2d 42 (Mo. 1952)..... 11,20

Desist v. United States, 394 U.S. 244, 252, 254, 89 S.Ct. 1030, 1035, 1036, 19 L.Ed.2d 248 (1969) 6

Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245 (3rd Cir. 1971)..... 4,21

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980) 4

Fuller v. Alaska, 392 U.S. 80, 89 S.Ct. 61, 20 L.Ed.2d 1116 (1968)..... 6

Gardner v. National Bulk Carriers, Inc., 221 F.Supp. 243 (E.D. Va. 1963), aff'd 333 F.2d 676 (4th Cir. 1964)..... 10

Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 271 A.2d 94 (1970) 10

Hardware Casualty Co. v. Harry Crown & Son, Inc., 6 Wis.2d 396, 94 N.W.2d 577, 581 (1959)..... 10

Henninger v. Southern Pacific Co., 250 Cal.App.2d 872, 59 Cal. Rptr. 76 (1976) 10

Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (Ind. 1956) 10

Houston v. Northup, 460 S.W.2d 572 (Mo.banc 1970).. 14

Ingle v. Illinois Central Gulf Railroad Co., 603 S.W.2d 32 (Mo.App.Banc 1980)..... 5,7

Johnson v. Penrod Drilling Co., 511 F.2d 234 (5th Cir.banc), cert. den. 423 U.S. 839 (1975)..... 10

Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) 6

Kacher v. Pittsburg National Bank, 545 F.2d 842 (3rd Cir. 1976) 16

Kawaomoto v. Tasutake, 49 Haw. 42, 410 P.2d 976 (1966) 10

Keltner v. Keltner, 589 S.W.2d 235 (Mo.banc. 1979) ... 15

Lang v. Texas & Pacific Railway Co., 624 F.2d 1275 (5th Cir. 1980) 21

Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d (5) (1973) 9,15

Louisville & Nashville Railroad Co. v. Mattingly, 318 S.W.2d 844, 848 (Ky. 1958) 10

Michaud v. Steckino, 390 A.2d 524 (Me. 1978) 10

Michigan v. Payne, 412 U.S. 47, 93 S.Ct. 1966, 35 L.Ed. 736 (1973) 6,9,10,17,18,20

Missouri-Kansas-Texas Railroad Co. v. McFerrin, 156 Tex. 59, 291 S.W.2d 931 (1956) 10

Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956) 10

Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980) 3,4 5,6,7,8,9,11,14,16,17,18,20,23

Norfolk Southern Railway Co. v. Rayburn, 213 Va. 812, 195 S.E.2d 860 (1973) 10

North Carolina v. Pearce, 396 U.S. 711, 89 S.Ct. 2772, 23 L.Ed.2d 656 (1969) 6,9,17

Oltersdorf v. Chesapeake & Ohio Railroad Co., 83 Ill.App.3d 395, 404 N.E.2d 320 (Ill.App. 1980) ... 7

Raines v. New York Central Railroad Co., 51 Ill.2d 428, 283 N.E.2d 230, cert den., 409 U.S. 983, 93 S.Ct. 322 10

Ramey v. Harber, 589 F.2d 753 (4th Cir. 1978) cert den., 442 U.S. 910, 99 S.Ct. 2823 (1979) 7,14

Scalise v. Central Railroad Company, 129 N.J. Super 303, 323 A.2d 525 (1974) 10

Seaboard Coast Line Railroad Co. v. Yow, 384 So.2d 13 (Ala. 1980) 7

Senter v. Ferguson, 486 S.W.2d 644 (Mo.App. 1972) ... 12

Spencer v. Martin K. Eby Construction Company, 186 Kan. 345, 350 P.2d 18 (1960) 10

Stallcup v. Taylor, 62 Tenn.App. 407, 463 S.W.2d 416 (1970) 10

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) 6

Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3rd Cir. 1977) 9

Rules

Missouri Supreme Court Rules of Civil Procedure Rule 70.02 11

No. 80-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

VS.

RICHARD L. INGLE,
Respondent.

On Petition For Writ of Certiorari
To The Missouri Court of Appeals, Eastern District

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent accepts petitioner's statement of the opinions below.

JURISDICTION

Respondent accepts petitioner's statement concerning jurisdiction.

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a fair and concise statement of the facts relevant to the issues herein. In order to avoid repetition, additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

Petitioner's Formulation Of The Questions Presented By The Instant Case Is Distorted And Misleading. Contrary To Petitioner's Assertions, The Issues Herein Affect Only A Narrow Class Of Cases. Petitioner Has Grossly Misinterpreted The Opinion Below In Order To Seek Review In This Court.

Petitioner's (hereinafter defendant) statement of the question presented for review distorts and obscures the true nature of the instant case. Contrary to the implications of petitioner's statement of the issues presented for review, the only issue involved herein is a very narrow one. On its facts, the only question actually presented by this record involves the trial court's response to a communication from a juror during deliberation. Further, this case was tried in the Missouri State Courts more than two years prior to the date of the decision in *Liepelt*. It was pending before the Missouri Court of Appeals, Eastern District, on petitioner's Motion for Rehearing following opinion, at the time of the decision in *Liepelt*. These aspects of the procedural posture of the instant case are of utmost importance. This case involves only the question of the application of *Liepelt* to an FELA case tried prior to the date of decision in *Liepelt* and pending on direct appeal on the date of decision in *Liepelt* - and nothing more. There can be no question as to the fact that *Liepelt* applies to each and every FELA case tried after the date of its decision, and that the jury must be instructed on income taxes upon request by the defendant in each such case. Nothing in *Ingle* is in any way inconsistent with that. This case presents absolutely no issue concerning the obvious and self evident necessity of following *Liepelt* in all cases tried after the date of its decision. Conversely, no question is presented in the instant case concerning actions in which all avenues of direct appeal were exhausted prior to the date of the decision in *Liepelt*. Obviously, such verdicts will stand.

In short, the issue presented herein will affect only an extremely limited number of cases - those which were tried prior to *Liepelt* and which were pending on appeal at the time of the decision in *Liepelt*. In all cases tried after *Liepelt*, of course, *Liepelt must* be given application.

Understanding of the narrow nature of the question involved in this case is essential because of the way in which defendant has chosen to state the questions presented. Defendant's formulation of the questions presented is misleading because it implies (and this is especially true of question 2 as presented by defendant), that *Ingle* announces a rationale for refusing to apply *Liepelt* in a case tried after the date of the decision in that case. Such is emphatically not the case. As will be demonstrated below, the *Ingle* court gave consideration to the fact that the damages in this case were fully supported by the evidence and were not excessive only in order to apply the tests laid down by this Court for determining whether a judicial decision should be given prospective or retroactive effect.

In this regard, defendant's discussion of *Flanigan* v. *Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), is highly inaccurate. *Flanigan* merely represents a rather routine application of the harmless error rule. In this regard, the *Flanigan* court, relying in part on *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971) (cited and relied upon by this Court in *Liepelt),* found that since the railroad was not precluded from offering evidence of net (after tax) earning, the evidence did not indicate the jury acted on an erroneous conception of the tax laws, and the evidence fully supported the verdict. The refusal to give an instruction on income taxes was not prejudicial and was harmless. Such application of the harmless error rule is common place and does not present any possibility, contrary to defendant's contentions, that any court will disregard or refuse to follow a decision of this Court. The *Flanigan* court did apply *Liepelt*. It merely found that reversal was not required.

Several other aspects of the procedural posture of the instant case deserve attention. In contrast to *Liepelt,* defendant made no attempt whatsoever to introduce any evidence pertaining to plaintiff's injuries, damages or wage loss. Plaintiff did not (again unlike the situation in *Liepelt)* present opinion evidence of the gross amount of wage loss through the testimony of an economist or actuary. Neither did defendant offer such evidence.

In further contrast with *Liepelt,* defendant in the instant case did not offer or request an instruction on income taxation prior to submission of the case to the jury. Under Missouri practice, instructions must be so offered in order for a party to complain on appeal of the trial court's refusal to give such an instruction. On its facts, this case merely involves the trial court's response to a communication received from a juror during the jury's deliberation.

Finally, defendant railroad has never contended on appeal that the damages awarded by the jury were excessive. It would appear that if defendant railroad genuinely thought itself prejudiced, it would have contended that the amount of the jury verdict was excessive, as it obviously was in *Liepelt.* The issue of instruction on income taxation, of course, has no bearing on liability. It relates solely to the issue of damages. In such circumstances, under Missouri law, since defendant has failed to raise excessiveness as a point on appeal, the prejudicial effect of the alleged error has not been properly preserved. *E.g., Myers* v. *Bi-State Development Agency,* 567 S.W.2d 638, 643 (Mo.banc 1978). This presents a sharp and vivid contrast when the instant case is compared with *Liepelt,* in which the damages were obviously and grossly excessive.

One other statement made by defendant requires clarification at the outset. In the beginning of its argument, defendant alleges that *Ingle* is in conflict with *Liepelt.* Such is emphatically not the case. *Liepelt* itself did not address the question of

whether it was to be applied to cases tried prior to the date of its decision but still pending on appeal at the time of the decision. Accordingly, it was perfectly proper for the Missouri Court of Appeals to address this issue, which was in effect reserved by *Liepelt,* by applying the existing law concerning such matters as enunciated by this Court. It is, in fact, extremely common for this Court to decide a substantive issue and then, at a later time, to determine whether that decision is to be given a retroactive effect to cases pending on appeal at the time of the decision. See, e.g., *Stovall* v. *Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) *United States* v. *Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert* v. *State of California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) applicable only to pretrial identification confrontations taking place after date of decisions in *Wade* and *Gilbert); Johnson* v. *State of New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) *(Escobedo* v. *State of Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), and *Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), not applicable to cases tried before those decisions were announced); *Desist* v. *United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (decision in *Katz* v. *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1968), applicable only to cases in which prosecution seeks to introduce evidence held illegal by *Katz* obtained after the date of the decision in *Katz); Fuller* v. *Alaska,* 392 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968) (decision in *Lee* v. *State of Florida,* 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1116 (1968), construing Section 605 of the Federal Communications Act applicable only to cases where trial commenced after the date of decision in *Lee); Michigan* v. *Payne,* 412 U.S. 47, 93 S.Ct. 1966, 35 L.Ed. 736 (1973) (denying retroactive effect to *North Carolina* v. *Pearce,* 396 U.S. 711, 89 S.Ct. 2772, 23 L.Ed. 656 (1969));*Chevron Oil Company* v. *Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (denying retroactive effect to *Rodrique* v. *Aetna Casualty and Surety Company,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360

(1969)). It should be noted that the foregoing cases involve issues of civil nonconstitutional law as well as criminal constitutional issues. In fact, this Court has explicitly recognized that retroactive application may be denied to a case involving nonconstitutional noncriminal law. *Chevron Oil Company* v. *Huson,* 404 U.S. 97, 107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). For the foregoing reasons, any suggestion that *Ingle* is in conflict with *Liepelt* is completely erroneous.

It should also be noted that *Cazad* v. *Chesapeake and Ohio Railroad Company,* 622 F.2d 72 (4th Cir. 1980), *Seaboard Coast Line Railroad Company* v. *Yow,* 384 So.2d 13 (Ala. 1980) and *Oltersdorf* v. *Chesapeake and Ohio Railroad Company,* 83 Ill.App. 3d 395, 404 N.E.2d 320 (1980), cited by defendant in its Petition, cannot be regarded as authoritative cases on the questions presented herein. The issue of the retroactivity of *Liepelt* was not even discussed and apparently was not raised in any of these cases. Thus, contrary to defendant's contentions, these cases cannot be regarded as being in conflict with the instant case. See *Ramey* v. *Harber,* 589 F.2d 753, 760 n. 8 (4th Cir. 1978), *cert den.* 442 U.S. 910, 99 S.Ct. 2823 (1979).

II.

Under The Standards Of Non-Retroactivity Analysis, As Developed And Applied By This Court, The Court Below Properly Held *Liepelt* Non-Retroactive. The Well Reasoned Opinion Of The Court Below Does Not Warrant Further Review By This Court.

With the foregoing observations concerning the actual posture of the instant case in mind, respondent (hereinafter plaintiff) respectfully submits that the decision by the Missouri Court of Appeals, Eastern District, en banc, in the instant case is entirely proper, exhibits scrupulous fidelity to the decisions of this Court, and does not warrant review by this Court.

The Missouri Court of Appeals, in holding that *Liepelt* should not be retroactively applied in the instant case, relied upon the standards set forth in this Court's opinion in *Chevron Oil Company* v. *Huson,* 404 U.S. 97, 106-107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971) wherein this Court held:

> "In our cases dealing with a nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see *e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra,* 392 U.S. at 496, 88 S.Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen* v. *State Board of Elections, supra,* 393 U.S., at 572, 89 S.Ct. at 835. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker, supra,* 381 U.S., at 629, 85 S.Ct. at 1738. Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' *Cipriano* v. *City of Houma, supra,* 395 U.S. at 706, 89 S.Ct., at 1900." (404 U.S. 107, 92 S.Ct. 355)

Applying the foregoing test, there can be no doubt that the Rule announced by this court in *Liepelt* was, for purposes of nonretroactivity analysis, one of first impression, satisfying the threshold test set forth in *Chevron.* Mr. Justice Stevens explicitly gave recognition to this fact in his opinion in *Liepelt* as follows:

> "In cases arising under the Federal Employers' Liability Act, most trial judges refuse to allow the jury to receive evidence or instruction concerning the impact of federal income taxes on the amount of damages to be awarded." ____ U.S. ____ at 100 S.Ct. at 756.

Mr. Justice Stevens characterized the refusal to give such income tax instructions as "the prevailing practice". *Id.* see also ____ U.S. at ____, n. 6 and accompanying text, 100 S.Ct. at 757, n.6 and accompanying text. The fact that the federal circuits were split on the question does not detract from the conclusion that the rule announced in *Liepelt* was one of first impression in this Court. In *Michigan* v. *Payne,* 412 U.S. 47, 93 S.Ct. 1966, 35 L.Ed. 736 (1973), denying retroactive affect to *North Carolina* v. *Pearce,* 396 U.S. 711, 89 S.Ct. 2772, 23 L.Ed.2d 656 (1969), this Court stated:

> *"The result of Pearce was not 'foreshadowed' by any prior decision of this Court.* Indeed, prior to *Pearce,* resentencing judges were bound by no requirement that they articulate their reasons and generally enjoyed a wide discretion in terms of the factors they might legitimately consider. See *Williams* v. *New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Nor could it be said that the Court's decision was clearly forecast by any trend of lower court decisions. *In Pearce itself the Court noted that lower federal and state courts were divided on all of the questions posed. 395 U.S., at 715 n. 5, 89 S.Ct., at 2075. Under these circumstances, judicial reliance on prior law was certainly justifiable".* (Emphasis added)

412 U.S. at 56, 93 S.Ct. at 1971. *See also Lemon* v. *Kurtzman* 411 U.S. 192, 199, 93 S.Ct. 1463, 1468, 36 L.Ed.2d 151 (1973).

The overwhelming weight of authority, prior to *Liepelt,* was that refusal to give a requested instruction on income taxation was not reversible error. *Boston & Me. R.R.* v. *Talber,* 360 F.2d 286 (1st Cir. 1966); *Varlack* v. *SWC Caribbean, Inc.,* 550 F.2d

171 (3rd Cir. 1977); *Gardner* v. *National Bulk Carriers, Inc.*, 221 F.Sup. 243 (E.D. Va. 1963); aff'd 333 F.2d 676 (4th Cir. 1964); *Johnson* v. *Penrod Drilling Co.*, 511 F.2d 234 (5th Cir banc), *cert den.* 423 U.S. 839 (1975); *Duncan* v. *St. Louis-San Francisco Railroad Co.*, 480 F.2d 79 (8th Cir.) *cert den.* 414 U.S. 859 (1973); *Scalise* v. *Central Railroad Company,* 129 N.J. Super 303, 323 A.2d 525 (1974); *Davis* v. *Fortino & Jackson Chevrolet Co.*, 510 P.2d 1376 (Colo.App. 1973); *Norfolk Southern Railway Co.* v. *Rayburn,* 213 Va. 812, 195 S.E.2d 860 (1973); *Raines* v. *New York Central Railroad Co.*, 51 Ill.2d 428, 283 N.E.2d 230, *cert den.* 409 U.S. 983, 93 S.Ct. 322 (1972); *Gorham* v. *Farmington Motor Inn, Inc.*, 159 Conn. 576, 271 A.2d 94 (1970); *Stallcup* v. *Taylor,* 62 Tenn.App. 407, 463 S.W.2d 416 (1970); *Henninger* v. *Southern Pacific Co.*, 250 Cal.App.2d 872, 59 Cal.Rptr. 76 (1967); *Kawaomoto* v. *Tasutake,* 49 Haw. 42, 410 P.2d 976 (1966); *Spencer* v. *Martin K. Eby Construction Company,* 186 Kan. 345, 350 P.2d 18 (1960); *Hardware Casualty Co.* v. *Harry Crown & Son, Inc.*, 6 Wis.2d 396, 94 N.W.2d 577, 581 (1959); *Bracy* v. *Great Northern Railway Co.*, 343 P.2d 848 (Mont. 1959), *cert den.*, 361 U.S. 949, 80 S.Ct. 403 (1960); *Louisville & Nashville Railroad Co.* v. *Mattingly,* 318 S.W.2d 844, 848 (Ky. 1958); *Briggs* v. *Chicago Great Western Railway Co.*, 248 Minn. 418, 80 N.W.2d 625 (1957); *Missouri-Kansas-Texas Railroad Co.* v. *McFerrin,* 156 Tex. 59, 291 S.W.2d 931 (1956); *Highshew* v. *Kushto,* 235 Ind. 505, 134 N.E.2d 555 (Ind. 1956); *Mitchell* v. *Emblade,* 80 Ariz. 398, 298 P.2d 1034 (1956); *Michaud* v. *Steckino,* 390 A.2d 524 (Me. 1978).

In light of the foregoing impressive array of authorities and the holding of the United States Supreme Court in *Michigan* v. *Payne,* 412 U.S. 47, 93 S.Ct. 1966, 35 L.Ed. 736 (1973) as quoted above, it is clear that the threshold test of *Chevron* has been met. Any contention to the contrary is specious. For this reason, *Crabtree* v. *St. Louis-San Francisco Railway Company,* ____ Ill. App. ____, 411 N.E.2d 19 (1980), cited by defendant in

its Petition, was wrongly decided, since that decision was based largely on the Illinois court's erroneous conclusion that *Liepelt* did not establish a new principle of law.

With respect to Missouri law, this Court is obviously aware of the opinion of the Missouri Supreme Court in *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), which was cited by this Court in *Liepelt.* For that reason, it is appropriate to develop subsequent events in Missouri law which rendered the giving of an income tax instruction impermissible under Missouri law. In the mid 1960's, subsequent to the decision in *Dempsey,* the Missouri Supreme Court introduced a system of approved pattern jury instructions. Two particular portions of the Missouri Supreme Court Rules of Civil Procedure governing this matter should be emphasized. Rule 70.02 (b) provides as follows:

> "*(b) Missouri Approved Instructions Exclude Others.* Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject."

Rule 70.02 (c) further provides:

> "(c) *Violation of Rule-Effect.* The giving of an instruction in violation of the provisions of this Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error."

In construing Rule 70.02 (then 70.01) in *Brown* v. *St. Louis Public Service Company,* 421 S.W.2d 255, 259 (Mo.banc 1967), the court held that deviations from applicable Missouri Approved Instructions (hereinafter MAI) are presumed to be prejudicial error:

"unless it is made perfectly clear by the proponent of the instruction that no prejudice could have resulted from such deviation."

Accordingly, the Missouri Court of Appeals, in *Senter* v. *Ferguson,* 486 S.W.2d 644, 646-647 (Mo.App. 1972), forbade the giving of an income tax instruction, and in so doing held as follows:

"Respondent contends that this exact instruction was specifically approved and authorized in *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42, and referred to with approval in *Bowyer* v. *Te-Co. Inc.,* Mo., 310 S.W.2d 892. Both these cases, 1952 and 1958 respectively, were decided by the Supreme Court prior to the adoption of M.A.I. Since that time we are unaware of any cases where such an instruction was the basis for an appeal. This case, is, therefore, in a limited respect, one of first impression.

The question we must answer is whether, after the promulgation and adoption of M.A.I., it was error to give this additional instruction on the issue of damages.

Supreme Court Rule 70.01, V.A.M.R. states, 'Whenever M.A.I. contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given *to the exclusion of any other on the same subject.'* (Emphasis ours). See also *Jurgeson* v. *Romine,* Mo.App., 422 S.W.2d 176.

In the instant case, in plain violation of this rule, two instructions on damages were given. While this was permissible before the introduction of M.A.I., it is now contrary to both the letter and spirit of the law. The court, in *Brown* v. *St. Louis Public Service Co.,* Mo., 421 S.W.2d 255, while not considering an 'income tax' instruction such as we have here, nevertheless used language which is appropriate

for this case. 'If counsel are permitted to "improve" the approved instructions, *even within the confines of specific precedents,* the value of these instructions will be lost.' (Emphasis ours). l.c. 258.

The *Brown* case held that a deviation from an M.A.I. instruction which does not need modification under the facts in the case establishes a presumption of prejudicial error. Likewise, in *Houston* v. *Northup,* Mo., 460 S.W.2d 572, the court was called upon to decide whether the giving of an additional instruction by the trial judge constituted error, in a situation where the jury requested clarification of the M.A.I. instructions given to them. The court stated at pp. 575-576, 'Implicit in a scheme of approved pattern instructions such as M.A.I. is the central idea that such instructions do not require further clarification or amplification. They submit ultimate issues and do so adequately. Consequently, we have held in cases such as *Brown* v. *St. Louis Public Service Co.,* Mo., 421 S.W.2d 255, and *Murphy* v. *Land,* Mo., 420 S.W.2d 505, that change in the prescribed language other than the authorized modifications is not permissible and constitutes error. *Necessarily, it also follows that it is not permissible to modify or enlarge or change or explain M.A.I. instructions by separate instructions not provided for or authorized in M.A.I. To permit modification, clarifications would be just as objectionable as doing so within the body of the prescribed instructions.* * * * M.A.I. makes no provision for, and does not authorize or contemplate that trial judges will devise additional instructions seeking to explain or amplify instructions which conform to M.A.I. (Emphasis ours).

The instruction which referred to taxes in the case at bar was clearly an addition to or 'modification' of M.A.I. 4.01 which was not called for by the issues in the case, and which has been specifically prohibited by our Supreme

> Court. ... *We must accordingly rule that the giving of this instruction established a presumption of prejudicial error which may have tended to influence the amount of the verdict. Thomas* v. *supra."* (Emphasis added except as otherwise indicated).

Additionally, in *Houston* v. *Northup,* 460 S.W.2d 572 (Mo.banc 1970), the Missouri Supreme Court, en banc, explicitly prohibited the giving of supplemental instructions to the jury in response to inquiries during jury deliberations. The court there held that the proper response to such an inquiry during deliberations is to advise the jury that the instructions previously given were proper. Such of course is exactly what the honorable trial court did in the instant case. Had the trial court undertaken to give any supplemental instruction, under M.A.I. and the then applicable law, it was virtually certain that any verdict returned would have been reversed on appeal. In this regard, the trial court cannot be convicted or error for complying with M.A.I. and for not anticipating *Liepelt,* which was not to be decided until some two and one half years later.

Application of the second portion of the *Chevron* test requires a court to

> "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. 107, 92 S.Ct. at 355.

In *Ramey* v. *Harber,* 589 F.2d 753, 758-759 (4th Cir. 1978), *cert den.* 442 U.S. 910, 99 S.Ct. 2823 (1979), the Fourth Circuit described this portion of the *Chevron* test as follows:

> "In civil cases, which present different considerations from those in criminal cases, the courts have often focused on such factors as reliance and the need for stability. We think this is the teaching of *Lemon* v. *Kurtzman,* 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), the most recent expression of the Supreme Court on the question.

> We are faced then with a situation where we must use the balancing process to determine whether the benefits to be gained by applying *Eirod* retroactively to this case are outweighed by considerations of reliance, hardship, injustice and the impact on the administration of justice in the Fourth Circuit."

In *Lemon* v. *Kurtzman,* 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), Mr. Chief Justice Burger, writing for the Court, emphasized the extreme importance attached to the interests of those who have relied upon prior law and repudiated the harsh notion that a law later overturned should be treated as if it never were the law. In this regard, Mr. Chief Justice Burger stated for the Court:

> "However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that *statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.* Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none." 411 U.S. at 199, 93 S.Ct. at 1468. (Emphasis supplied).

In the instant case, reliance on prior law is a critical factor. Apart from the fact that defendant offered no income tax instruction before the case was submitted to the jury, as demonstrated above, under M.A.I., the refusal of an income tax instruction was not merely a matter of reliance on existing law but was one of judicial compulsion by existing law. As observed by the Missouri Court of Appeals in the instant case, the Missouri Appellate Courts "forbade" such an instruction. 603 S.W.2d at 34. Consideration of the reliance aspect therefore clearly points towards prospectivity. See also *Keltner* v. *Keltner,*

589 S.W.2d 235, 239-240 (Mo.banc 1979); *Kacher* v. *Pittsburg National Bank,* 545 F.2d 842, 845-846 (3rd Cir. 1976).

Further, when the purpose of the rule announced in *Liepelt* is measured against the facts of the instant case, the conclusion is quite inescapable that refusal to apply *Liepelt* retroactively in the instant case can in no manner be said to retard the operation of the rule in *Liepelt*. The Missouri Court of Appeals in the instant case properly characterized the primary purpose of *Liepelt* as "the Court's desire to prevent the rendering of an excessive verdict founded upon improper considerations". 603 S.W.2d at 34. This purpose was clearly expressed by Mr. Justice Stevens in his opinion for the court in *Liepelt,* wherein he stated that the giving of an income tax instruction:

> "would merely eliminate an area of doubt or speculation which might have an improper impact on the computation of the amount of damages." ____ U.S. at ____, 100 S.Ct. at 760.

This Court in *Liepelt* was obviously motivated by the extreme excessiveness of the damages awarded in that case. The excessiveness of the award was repeatedly emphasized by the Court in contrasting the computations of plaintiff's expert witness to the damages awarded which exceeded the expert's computations by two and one half times. 100 S.Ct. 756, 757, 759. The Court's motivation is well summarized in the following statement:

> "In this case the respondent's expert witness computed the amount of pecuniary loss at $302,000, plus the value of the care and training that decedent would have provided to his young children; the jury awarded damages of $775,000. It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery."

100 S.Ct. 755, 759. The circumstances were further aggravated by the trial court permitting plaintiff to present expert testimony concerning gross future wage loss, while depriving defendant of the opportunity to cross examine and present its own expert's computations of after-tax future wage loss.

By requiring an income tax instruction upon the request of the defendant, the Court in effect created a prophylactic rule, directed to insuring that improper matters are not taken into consideration by the jury in computing damages and therefore providing additional assurance against an excessive verdict. In that respect, the Court's attention is invited to the striking parallel between the purpose of the rule in *Liepelt* and the purpose of the rule announced in *North Carolina* v. *Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). *Pearce* established safeguards to prevent the possibility of consideration of improper factors in resentencings of criminal defendants upon conviction on retrial following reversal of original convictions. *Michigan* v. *Payne,* 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed. 736 (1973), denied retroactive effect to *Pearce* with respect to rsentencings which occurred prior to the date of the decision in *Pearce,* thereby denying retroactive application to cases pending on direct review in which the resentencing took place prior to *Pearce.*

Pearce involved contentions that the trial court considered an improper factor, vindictiveness toward or punishment of a defendant for exercising the right to appeal, on resentencing after a conviction in a retrial held following a successful appeal from initial conviction. Established principles of due process prohibit considerations of such factors, and *Pearce* held that when a judge decrees a more severe sentence after retrial, he must articulate his reasons therefor and those reasons must relate to objective matters arising since the date of original sentencing. *Pearce,* therefore, created a prophylactic rule designed to insure against trial judge vindictiveness on resentencing.

Comparing *Liepelt* with *Pearce,* the relevant similarities are immediately apparent. Just as in *Pearce,* it was clear before *Liepelt,* that income taxation was not a proper matter for juries to consider in assessing damages. As in *Pearce, Liepelt* created what is, in effect, a prophylactic rule designed to insure that the matter of income taxation is not improperly considered by the jury.

With the foregoing in mind, the court's attention is invited to the analysis in *Payne* pertaining to the purpose of the rule in *Pearce* and the effect of that purpose in nonretroactivity analysis:

> "The first-articulated purpose of the *Pearce* rules — to protect against the possibility that actual vindictiveness will infect a resentencing proceeding — deserves closer scrutiny. Unlike the purposes underlying many of the decisions heretofore accorded retrospective application, this purpose does not implicate the ' "fair determination" of . . . *guilt or innocence.' Roberts* v. *Russell,* 392 U.S. 293, 294, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100 (1968) (emphasis supplied). It does, however, involve questions touching on the 'integrity' of one aspect of the judicial process. *McConnell* v. *Rhay,* 393 U.S. 2, 3, 89 S.Ct. 32, 33, 21 L.Ed.2d 2 (1968). The *Pearce* restrictions serve to ensure that resentencing decisions will not be based on improper considerations, such as a judge's unarticulated resentment at having been reversed on appeal, or his subjective institutional interest in discouraging meritless appeals. By eliminating the possibility that these factors might occasion enhanced sentences, the *Pearce* prophylactic rules assist in guaranteeing the propriety of the sentencing phase of the criminal process. In this protective role, *Pearce* is analogous to *Miranda* v. *Arizon,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), in which the Court established rules to govern police practices during custodial interrogations in order to safeguard the rights of the

accused and to assure the reliability of statements made during those interrogations. Thus, the prophylactic rules in *Pearce* and *Miranda* are similar in that each was designed to preserve the integrity of a phase of the criminal process. Because of this similarity, we find that *Johnson* v. *New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), which held *Miranda* nonretroactive, provides considerable guidance here. See also *Jenkins* v. *Delaware,* 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969).

It is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce,* that their retrospective application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation. *Miranda's* well-known warning requirements provided a protection 'against the possibility of unreliable statements in *every* instance of in-custody interrogation,' and thereby covered many 'situations in which the danger [was] not necessarily as great as when the accused is subjected to overt and obvious coercion.' *Johnson* v. *New Jersey, supra,* 384 U.S., at 730, 86 S.Ct. at 1779 (emphasis supplied). Thus, had *Miranda* been applied retroactively, it would have required the reversal of many convictions in which no serious constitutional violation had occurred. *Id.,* at 731, 86 S.Ct. at 1779. Likewise, the retroactive application of *Pearce* would require the repudiation of many sentences rendered under circumstances in which there was no genuine possibility that vindictiveness played a role. Judicial impropriety in the resentencing process, albeit intolerable wherever it happens, surely is not a common practice. Indeed, nothing in *Pearce* intimates that the Court regarded it as anything more than an infrequently appearing blemish on the sentencing process. *Absent countervailing considerations rooted in the purposes underlying a new rule, this factor — that retroactive application of such broadly protective*

rules would occasion reversals in many instances in which no actual prejudice has been suffered — points toward a ruling of prospectivity."

412 U.S. at 52-54, 93 S.Ct. 1969-70 (Emphasis supplied).

As the foregoing illustrates, the question of prejudice to the defendant is one which must be considered in the balancing test required by *Chevron*. When the matter in issue goes only to the issue of damages, it is inevitable that in order to determine whether prejudice has occurred one must consider whether the damages awarded were excessive. In the instant case, as noted by the court below, defendant has not contended on appeal that the damages were excessive. A review of plaintiff's injuries, which are set out fully below, demonstrates that the verdict was reasonable and more than amply supported by the evidence. In fact, the verdict returned by the jury was $125,000.00 less than the amount requested by plaintiff in final argument (T. 755). For these reasons, as observed by the court below, it is difficult to imagine how defendant was prejudiced in the instant case. Under such circumstances, automatic, indiscriminate retroactive application of *Liepelt* to each and every case tried prior to the date of its decision but still pending on appeal at the time of the decision would, as in *Michigan* v. *Payne,* require reversals in many instances in which no actual prejudice has been suffered. Therefore, under the law as announced by this Court, such a finding points toward a ruling of prospectivity. Further, and contrary to the implications of defendant's Petition for Writ of Certiorari, consideration of whether actual prejudice has been suffered does not constitute an "escape" from *Liepelt* but rather a proper application of the rules announced by this Court for evaluating the prospectivity question.

An examination of the history of income tax instruction also points to a ruling of prospectivity. As noted by the court below, the three cases cited and relied upon by this court in *Liepelt, Dempsey* v. *Thompson,* 251 S.W.2d 42 (Mo. 1952),

Domeracki v. *Humble Oil and Refining Company,* 443 F.2d 1245 (3rd Cir. 1971) and *Burlington Northern, Inc.* v. *Boxburger,* 529 F.2d 284 (9th Cir. 1975), all mandated the giving of such income tax instructions prospectively only. Thus, the history of the rule, as set forth in the foregoing cases, clearly indicates that prospective application has not been held to retard the operation of the rule.

Lang v. *Texas & Pacific Railway Company,* 624 F.2d 1275 (5th Cir. 1980), cited by defendant, cannot be regarded as persuasive or authoritative. *Lang* does not even attempt to apply the foregoing balancing test, required by *Chevron,* and gives absolutely no consideration to the reliance factor

Discussion of the balancing test obviously shades into the final factor of the *Chevron* test, that is the inequity and hardship which will be suffered by plaintiff as a result of any reversal in the instant case.

Again, a key factor is the question of reliance. Apart from the fact that defendant offered no income tax instruction before the case was submitted to the jury, as fully demonstrated above, the supplemental instruction requested by defendant was clearly prohibited under M.A.I. As also demonstrated above, compliance with the provisions of M.A.I. is mandatory. The Missouri Courts have recognized that it is extremely harsh and unjust, and constitutes a penalty, to reverse a judgment in a case in which instructions were given in accordance with M.A.I., even if subsequent developments mandated changes in the instruction. In *Smile* v. *Lawson,* 506 S.W.2d 400, 402 (Mo. 1974), the Missouri Supreme Court stated:

> "The trial court having given an approved instruction the use of which at the time was mandatory may not be convicted of error in not anticipating future changes in instructions on the subject."

To reverse the judgment in the instant case, and compel plaintiff to suffer the expense, hardship and injustice of a retrial because the trial court complied with the then mandatory provisions of Missouri law which did not permit a reply to the juror's communication, would be extremely harsh. Such a result could cause a windfall benefit to this defendant, who, as demonstrated above, has suffered no prejudice. Plaintiff suffered his severe and debilitating injuries more than seven years ago. He has yet to receive a penny of the compensation properly due him due to the indisputably demonstrated negligence of the defendant. Reversal and retrial of this case would inevitably involve additional burdensome expense and undoubtedly would also involve further years of delay during retrial and subsequent appeals. In this regard, it should be noted that damages were never seriously contested by defendant during the trial of the case. In essence, plaintiff, who has been severely disabled through no fault of his own, would be penalized for the trial court's compliance with the mandatory rules in effect at the time of trial, a matter in which he had no real choice. Obviously, reversal under these circumstances, would be grossly inequitable and harsh.

Taking all the relevant factors into consideration-that defendant made no attempt whatsoever to introduce any evidence pertaining to plaintiff's injuries, damages or wage loss; that there was no issue in the trial and no acturarial testimony presented by either party pertaining to wage loss calculations; that the defendant-railroad did not even offer an instruction on income taxation prior to submission of the case to the jury; that, in any event, Missouri appellate courts forbade the giving of an income tax instruction; that the record in the instant case, on its facts, presents only the limited inquiry of whether the trial court properly responded to a communication received from a juror during the jury's deliberations; that the damages were not really contested by defendant in the trial; that the amount of the verdict was clearly not excessive, was fully supported by the evidence, and the defendant-railroad did not even raise the issue

of the excessiveness of the verdict as a point on appeal; and that the history of the rule announced in *Liepelt* points toward a holding of prospectivity—it is evident that the hardship and injustice of applying *Liepelt* retroactively to the instant case far outweighs the benefits to be gained by such retroactive application.

In order to place the matter in perspective, plaintiff's injuries can be summarized as follows. All of the evidence presented in the trial, with respect to injuries and damage, was presented by plaintiff. That evidence was entirely undisputed. The jury had the benefit of the testimony of four physicians, including a neurosurgeon, a neurologist and orthopedic surgeon (T. 322-333, 346-417, 420-490, 490-520), and numerous hospital and medical exhibits (Plff's. Exs. 10, 15, 16, 17, 18). Plaintiff was initially hospitalized for a full spine myelogram which revealed defects in the cervical and lumbar spine (Plff's. Ex. 15; T. 343, 344, 357, 358). He was rehospitalized shortly thereafter for surgery involving a hemilaminectomy, exploration and decompression at C-5, C-6 (Plff's. Ex. 16; T. 367-374, 412, 413). Thereafter, he was hospitalized on a third occasion for a hemilaminectomy at L4-L5 (Plff's. Ex. 17; T. 380-383). His fourth hospitalization for an additional myelogram revealed a central filling defect at L4-L5 (Plff's. Ex. 18; T. 391-393). Plaintiff has experienced nothing except steady downhill progression (T. 399, 400). His injuries can be summarized as follows: Ruptures of the discs of the cervical and lumbar spine (T. 367-374, 380-383, 391, 392, 412, 413); massive damage to all of the nerve roots and nerves in the neck, shoulder blade and under the clavicle supplying the right upper extremity, including C-4, C-5, C-6, C-7, C-8 and T-1 (T. 457, 458, 508); severe damage to all of the muscles of the right upper extremity resulting from the damage to the cervical nerve roots and nerves supplying those muscles; almost total atrophy, withering, weakness, wasting, deterioration and loss of reflexes, motor function, and use of the entire right upper extremity, including the shoulder, back, arm, hand and supporting muscles and tissue (T. 428, 433, 448, 449, 450,

454, 455-459, 498, 499, 503, 506, 508); severe damage to the nerves and muscles of the low back and lumbar spine; constant pain in the right leg, weakness, loss of relexes and atrophy; additional defects and bulging of the discs in the lumbar spine (T. 391, 392, 448, 449, 451, 452, 456, 466, 489, 490, 503, 505, 506, 518). He suffers from constant severe and excrutiating pain, requiring the utilization of a subcutaneous nerve stimulator, which is affixed to his body, and constant use of Percodan, a narcotic synthetic codeine pain medication (T. 286, 287, 390, 391, 395, 397-400, 450). The pain is unbearable and prevents him from sleeping (T. 287). It runs from the top of his shoulder blades, all the way down between his shoulders, into his arm and his right hand feels as if it is in a bucket of fire (T. 288). The pain also extends from his low back into his right leg and foot (T. 287, 288). The fingers of his right hand often lock in a closed position or fist and he is required to physically pull the fingers open with his other hand (T. 279). He is unable to lift his arm and has almost no hand grasp; his grip was described as feeble (T. 450, 454, 503). He has almost total atrophy of the right upper extremity, absent bicep and tricep jerks, almost completely flaccid muscles (T. 498). He is permanently disabled from any sort of work and will never regain ability to perform any work again (T. 498, 499). There is no way on earth that he is going to return to any sort of normal functioning life again (T. 506). His injuries are permanent, his future is dismal, with a continuing downhill course (T. 398-400, 466, 467, 508, 511). His condition is perhaps best described by his treating neurosurgeon who stated (T. 398):

> "... I really feel sorry for the man, because he is sort of stuck with the situation he is in right now, and there isn't a great deal that I have to offer further to assist him to any more of a continuing downhill course."

Plaintiff was 44 years of age at the time of his injury and 49 years of age at the time of trial (T. 211). He would have in all probability continued his railroad employment until age 65, but for his injuries.

Under the circumstances, as set forth above, reversal of the judgment in the instant case would clearly be a distortion and a mockery of justice. It would impose a harsh and unjust burden on plaintiff as a result of a matter which had absolutely no impact on the judgment in this case.

CONCLUSION

For all of the foregoing reasons, plaintiff (respondent) respectfully submits that the judgment of the Missouri Court of Appeals, Eastern District, en banc, below, is entirely correct and in accordance with the previous decisions of this Court and that the same does not warrant review by this Court. For that reason, it is further respectfully submitted and urged that the Petition for Writ of Certiorari in the instant case should be denied.

Respectfully submitted,

FRIEDMAN WEITZMAN &
FRIEDMAN, P. C.
C. MARSHALL FRIEDMAN
NEWTON G. McCOY
1133 Pine Street
St. Louis, Missouri 63101
(314) 621-2200

Attorneys for (Plaintiff-)
Respondent

No. 80-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

RICHARD L. INGLE,
Respondent.

PETITIONER'S REPLY BRIEF
In Support of Its Petition for a Writ of Certiorari

ALPHONSO H. VOORHEES
GREENFIELD, DAVIDSON,
MANDELSTAMM & VOORHEES
721 Olive Street
St. Louis, Missouri 63101
(314) 241-5735
(Counsel of Record)

THOMAS H. POLLIHAN
Counsel for Petitioner

January 22, 1981

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF AUTHORITIES

Page

Cases

Cazad v. Chesapeake & Ohio Railway Co., 622 F.2d 72 (4th Cir. 1980) 6

Crabtree v. St. Louis-San Francisco Railway Co., 411 N.E.2d 19 (Ill. App. 1980) 7

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980) 7

Ingle v. Illinois Central Gulf Railroad Company, 603 S.W.2d 32 (Mo. App. 1980) 1

Koehler v. Burlington Northern, Inc., 573 S.W.2d 938 (Mo. App. 1978) 4

Lang v. Texas & Pacific Railway Co., 624 F.2d 1275 (5th Cir. 1980) 6

Liepelt v. Norfolk & W. Ry. Co., 62 Ill. App. 3d 653, 378 N.E.2d 1232 (Ill. App. 1978) 5

Meyers v. Bi-State Development Agency, 567 S.W.2d 638 (Mo. Banc 1978) 5

Norfolk & Western Railway Company v. Liepelt, 404 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980); reh. den. ____ U.S. ____, 100 S.Ct. 1667, 64 L.Ed.2d 250 (1980) 2

O'Byrne v. St. Louis Southwestern Railway Co., 632 F.2d 1285 (5th Cir. 1980) 6,7

Oltersdorf v. Chesapeake & Ohio Railroad Co., 83 Ill. App. 3d 395, 404 N.E.2d 320 (Ill. App. 1980) 7

Seaboard Coast Line Railroad Co. v. Yow, 384 So.2d 13 (Ala. 1980) 7

Rules

United States Supreme Court Rule 23.1 6

No. 80-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY,[1]
Petitioner,

vs.

RICHARD L. INGLE,
Respondent.

PETITIONER'S REPLY BRIEF
In Support of Its Petition for a Writ of Certiorari

The Brief for Respondent in Opposition may create confusion and misapprehension as to certain of the facts and issues involved in the Petition for Writ of Certiorari in this case. For this reason it is necessary to submit this Reply Brief.

Before undertaking a general analysis of Respondent's Brief in Opposition, certain specific items must be addressed. Respondent has seen fit to restate the Question Presented in a rambling and seemingly endless sentence, apparently attempting to distinguish the particular facts of *Ingle* v. *Illinois Central*

---

[1] A listing of all related corporations was included in footnote 1 of the Petition For Writ of Certiorari.

Gulf Railroad Company, 603 S.W.2d 32 (Mo. App. 1980) from the particular facts of *Norfolk & Western Railway Company* v. *Liepelt,* 404 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980); reh. den. ____ U.S. ____ ,100 S.Ct. 1667, 64 L.Ed.2d 250 (1980). The seven or eight particular characteristics of the *Ingle* case listed are for the most part irrelevant to the real issue before this Court. Furthermore, they are not all accurate statements. For example, the record does present more than the issue of the trial court's response to the jury's question, because an instruction was requested by petitioner and refused; and the petitioner did indeed have a point on appeal asserting that the trial court's refusal to instruct on the income taxation issue resulted in the jury prejudicially inflating the size of the verdict. Respondent's Question Presented also characterizes a reversal based on *Liepelt's* retroactive application as "arbitrary". The only logical inference to be drawn from this is that respondent considers the decision of this Court in *Liepelt* as well as all the post-*Liepelt* decisions mentioned in the Petition for Certiorari to likewise involve "arbitrary" reversals.

Respondent asserts that petitioner's Statement of the Case is not "fair and concise". A quick review of this Statement of the Case will reveal that it is less than one page in length and is composed mainly of chronological narrative plainly presented without argument. Given this brevity it seems obvious that respondent could easily correct any misstatements contained therein. Instead, respondent does not even attempt to explain what is wrong with the statement. We feel respondent's sole motivation for such unfounded criticism is an attempt to unjustly discredcit petitioner in the eyes of this Court, and not to assist this Court in assessing the merits of this application for certiorari.

Concededly, the issue here is a narrow one - whether *Liepelt* must be applied retroactively and uniformly to a similar case pending on direct appeal. But the *Ingle* case is not the sole case

involved here, nor is the number of cases involved "extremely limited" as respondent asserts on page 4 of his brief. We note respondent's failure to comment on the three similar cases pending in Missouri. As respondent's counsel is also counsel of record for each of these three cases, his failure to mention or discuss these cases may be viewed as a concession as to the accuracy of petitioner's statements regarding them. Obviously, it is extremely difficult to put a number on how many other cases there might be in this same procedural status in Missouri, let alone all the other state and federal jurisdictions. If each such jurisdiction had only three, then at least one hundred fifty cases would be involved. Perhaps Liepelt's counsel was closer to the mark when he stated on page seven of Liepelt's Petition for Rehearing filed with the United States Supreme Court that there would be "hundreds, if not thousands," of such cases.

A misleading aspect of respondent's brief is his continual assertion that petitioner, the defendant railroad, never contended on appeal that the damages awarded were "excessive". In fact, the main thrust of respondent's argument is simply that petitioner was not prejudiced by the trial court's refusal to give the instruction. Unfortunately, the *Ingle* court appears to have been confused by this "excessiveness" issue. Respondent seeks to foster that same confusion in this Court. When properly analyzed, it is clear: (1) that the jury asked the court for legal guidance as to the effect of income taxation on the verdict; (2) in response to this inquiry the petitioner requested a proper instruction on taxation; (3) that the trial court refused; (4) that petitioner preserved and argued this error all the way through the appeal; and (5) that petitioner was prejudiced by the refusal of the instruction.

In order to clear the muddied waters, reference should be made to petitioner's brief on appeal in the Missouri Court of Appeals. Amended Point IV of petitioner-defendant's brief dealt with the issue and stated:

> "After the jury had specifically requested information with regard to the effect of taxes on the verdict, the trial court erred in refusing defendant's request that the jury be instructed as to the applicable law that a verdict for plaintiff was not subject to any federal or state income taxes, because defendant is entitled to instructions on the law applicable to the jury's verdict and *the failure to give such instruction resulted in the jury inflating the size of the verdict to take into account the question of taxation.*" (emphasis added).

The first paragraph under the above Point of petitioner-defendant's brief states:

> "Although the defendant has not raised the issue of excessiveness in order to request a remittitur to this court, defendant submits that the amount of the verdict has been inflated because of the judge's refusal to properly respond to this question of the jury and defendant has been prejudiced thereby."

Petitioner's decision not to request a remittitur was predicated upon the deliberate and obvious retreat by the Missouri appellate courts from the application of the doctrine of remittitur and their trend towards letting the jury's award stand. The court's philosophy on this doctrine is perhaps best stated in *Koehler* v. *Burlington Northern, Inc.* 573 S.W.2d 938 (Mo. App. 1978):

> "The purpose of a doctrine of remittitur is to prevent awards from *exceeding the upper limits of fair and reasonable compensation.* (l.c. 945)...We will not order a reduction of the verdict unless as *a matter of law it is excessive.* It must be so grossly excessive that it *shocks the conscience of this court* and convinces us that *both the jury and the trial court abused their discretion*....We will exercise our power to interfere with their judgment with caution and *only when the verdict is manifestly unjust.*" (l.c. 946.) (emphasis added).

Keeping in mind that the term "excessiveness" is equated with a verdict so large that it "shocks the conscience of the court" or is "manifestly unjust" and mi· dful of the Missouri appellate court's repeated recent decisions refusing to exercise the doctrine of remittitur, petitioner did not request remittitur. In this sense, and in this sense only, petitioner did not argue that the verdict was "excessive".

Towards the bottom of page 5 of his brief, respondent attempts to inject a false issue into this case by claiming that petitioner's failure to raise "excessiveness" as a separate point on appeal fails to preserve the prejudicial effect of the alleged error, citing *Meyers* vs. *Bi-State Development Agency,* 567 S.W.2d 638, 643 (Mo. Banc 1978). This is a misrepresentation of Missouri law, as seen by reference to footnote 1 of the *Meyers* case which states "point that verdict was excessive *not* needed if error relates to instructions on damages..." (1.c. pg. 643). Understandably, the Missouri Court of Appeals ignored this same argument which respondent had made before it on appeal.

The importance of the distinction between "excessiveness" and "inflation" of the award based on an improper instruction is perhaps best set out in the *Liepelt* case itself. Respondent seeks to distinguish *Ingle* and *Liepelt* by arguing that damages in *Liepelt* were "obviously and grossly excessive", (pg. 5), and that the court in *Liepelt* was "obviously motivated by the extreme excessiveness of the damages awarded in that case." (pg. 16). All this emphasis on the excessiveness of the *Liepelt* damage award is misplaced. In fact, the Illinois Appellate Court specifically ruled that the amount of damages awarded in *Liepelt* was *not* "excessive". *Liepelt* v. *Norfolk & Western Railroad Company,* 62 Ill. App. 3d 653, 378 N.E.2d 1232 (Ill. App. 1978).

A proper reading of the *Liepelt* decision will clarify the fact that it was not predicated upon the finding of excessiveness of the verdict. This Court states in *Liepelt:*

> "It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery. *Whether or not this speculation is accurate,* we agree with petitioner that, as Judge Ely wrote for the Ninth Circuit,
>
> 'To put the matter simply, giving the instruction can do no harm, and it can certainly help by *preventing the jury from inflating the award and thus overcompensating* the plaintiff on the basis of an erroneous assumption that the judgment will be taxable....' " 63 L.Ed.2d at 696. (emphasis added).

Therefore, petitioner's emphasis in its prior briefs on the prejudice from the "inflation" of the verdict as opposed to arguing "excessiveness" for the purposes of remittitur was prophetic of the very decision of the United States Supreme Court in *Liepelt,* which itself emphasized the danger of "inflation" of the verdict as opposed to requiring the finding of "excessiveness" of the damages.

Point II of Respondent's Brief, covering pages 7 to 25 , concerns the ultimate merits of the issue involved herein. The proper place for such extended argument is of course in the briefs on the merits, should the writ be granted. However, petitioner is not unmindful of Supreme Court Rule 23.1, allowing summary disposition on the merits after the petition and reply have been filed. A short response must therefore be made.

Respondent's aguments on the merits of the *Ingle* decision utterly fail to justify the fact that *Ingle* is in conflict with three United States Circuit Courts of Appeals and two state appellate courts. In fact, all reported decisions on the issue have ruled contrary to *Ingle* and held that *Liepelt* must be applied retroactively to a case on direct review. *Cazad* v. *Chesapeake & Ohio Railway Co.,* 622 F.2d 72 (4th Cir. 1980); *Lang* v. *Texas & Pacific Railway Co.,* 624 F.2d 1275 (5th Cir. 1980); *O'Byrne* v.

St. Louis Southwestern Railway Co., 632 F.2d 1285 (5th Cir. 1980); *Flanigan* v. *Burlington Northern, Inc.*, 632 F.2d 880 (6th Cir. 1980); *Seaboard Coast Line Railroad Co.*, v. *Yow*, 384 So.2d 13 (Ala. 1980); *Oltersdorf* v. *Chesapeake & Ohio Railroad Co.*, 83 Ill.App.3d 395, 404 N.E.2d 320 (Ill.App. 1980); *Crabtree* v. *St. Louis-San Fancisco Railway Co.*, 411 N.E.2d 19 (Ill.App. 1980).

The decisions in those cases ably refute all the arguments of respondent herein. In fact, two of those cases decided after *Ingle* actually discuss the *Ingle* opinion and find it to be wrongly decided, *Flanigan* v. *Burlington Northern, Inc., supra, and Crabtree* v. *St. Louis-San Francisco Railway Co., supra.*

Respondent also details the personal injuries involved in the case and laments the hardship that a new trial would involve. Perhaps this is best put into perspective by the recent decision in *O'Byrne* v. *St. Louis Southwestern Railway Co.*, 632 F2d 1285 (5th Cir. 1980). There the court ruled both that *Liepelt* must be given retroactive effect and that *Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested instuction. In discussing its reversal based upon the retroactive application of *Liepelt,* the court stated:

> " 'We do not find that retroactive application of *Liepelt* to this case will result in "manifest injustice." ' *Lang, supra,* at 1280. And here, as there, plaintiff is not deprived of the right to a just and adequate recovery; he is simply compelled to establish it under proper jury instruction". 632 F.2d at 1287.

Furthermore, as noted in *Crabtree* v. *St. Louis-San Francisco Railway Co., supra,* most of respondent's arguments for the prospective effect of *Liepelt* have already been presented to this Court in Liepelt's own Petition for Rehearing. That petition was denied April 14, 1980 (____ U.S. ____ ,100 S.Ct. 1667, 64 L.Ed.2d 250).

Petitioner is prejudiced by the *Ingle* decision, which has been wrongfully decided and conflicts with every other reported decision on the issue. Unless this Court corrects the *Ingle* decision through granting this Petition for Writ of Certiorari, an imminent danger lies ahead that countless other cases will be wrongly decided on the basis of *Ingle*. Leaving the retroactive application of *Liepelt* to the discretion of all the lower courts would involve confusion and a threat to the ordered administration of justice. This is especially true since this case is brought under the FELA, the purpose of which is to provide a uniform body of substantive law to be applied in federal and state courts alike for the mutual benfit of the railroads and their employees.

It is again respectfully submitted that because of the clear-cut conflict on the question of the retroactive application of the *Liepelt* decision and because of the developing probability of non-uniform application of the *Liepelt* decision, both of which questions are of great importance to the nation's railroad industry, the within Petition for Writ of Certiorari should be granted so that the decision of the Missouri Court of Appeals, Eastern District, can be reviewed and proper guidance provided by this Court on these questions.

Respectfully submitted,

Alphonso H. Voorhees
Thomas H. Pollihan
Greenfield, Davidson,
Mandelstamm & Voorhees
721 Olive Street, #1516
St. Louis, Missouri 63101
(314) 241-5735
Counsel for Petitioner